

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 21 March 2018

Public Authority: Lancashire County Council

Address: CSSGFreedom@lancashire.gov.uk

Decision (including any steps ordered)

1. The complainant has requested noise monitoring data, held by a third party, to which Lancashire County Council has access. The council has released some information but refused the remainder citing regulation 12(4)(a), information not held. The Commissioner has considered whether the requested information is held on behalf of the council by virtue of regulation 3(2).
2. The Commissioner's decision is that the information is not held on behalf of Lancashire County Council, and furthermore that, on the balance of probabilities, the council has provided all the information held. She therefore finds that that regulation 12(4)(a) of the EIR is engaged.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 30 March 2017 the complainant wrote to Lancashire County Council ('the Council') and requested information in the following terms:

"Please could you send me noise monitoring data from the Preston New Road Fracking site?"

Data should be available for LA90,1hr, LAeq,1hr, LAeq,100ms, LAmax,1hr.

I would like to see the data for LAeq,1hr and LAmax,1hr for all days since work commenced. And LAeq,100ms for Thursday 30 March 2017.

If at all possible, access to the live monitoring feed would be very useful as well and save me having to ask repeatedly for data."

5. The Council responded on 4 April 2017 advising that the information is not held. It stated:

"Lancashire County Council does not hold this information, and therefore the request is refused by virtue of Regulation 12(4)(a) of the Environmental Information Regulations 2004. The data is owned and kept by the operator of the site. LCC can view the data online as part of its planning regulatory compliance checks. The operator is currently exploring ways to make the data public but this would be for the previous month. Longer term, the County Council wishes to explore with the operator ways to make the live data publically available but this has a significant cost and is not required by the planning conditions."

6. The complainant requested an internal review on 4 April 2017. The Council provided a response on 13 June 2017. In the main it maintained its original position, however it also disclosed one item of held information:

"It is unreasonable to expect the County Council to download and distribute data to anyone upon request, especially given that noise data will soon be publically available on the operator's web site. We can only disclose information that we hold. The only data we currently have is a screenshot of a graph (see attached). This is for noise from the road on 2 March."

Scope of the case

7. The complainant contacted the Commissioner on 31 August 2017 to complain about the way his request for information had been handled. Specifically that:

"I requested noise data from LCC [Lancashire County Council] from the fracking site on Preston New Road on April 4th 2017. The planning documents state "Remote communication with both noise loggers is required and the measured data will be available to LCC and to Cuadrilla at all times, to view in real time and for later review."

I have contacted the company that supply the monitoring equipment and software and they have confirmed that the data is available to LCC as a live feed and old data is downloadable.

LCC have refused on the basis that until it is downloaded the data is not 'held' by themselves which seems like a loophole."

8. The Commissioner considers the scope of the investigation to be whether or not, on the balance of probabilities, the Council holds the information the complainant has requested, and has complied with regulation 12(4)(a) of the EIR.

Reasons for decision

Regulation 3(2) / 12(4)(a)

9. The EIR gives members of the public the right to access environmental information. Regulation 3(2) provides that information is held by a public authority if the information (a) is in the authority's possession and has been produced or received by the authority, or (b) is held by another person on behalf of the authority. Regulation 12(4)(a) states that a public authority is not required to disclose information to the extent that it did not hold the information when an applicant's request was received.
10. The Council's considers that there are two principle factors in support of its position that the requested information is not held. Firstly that it can access and view the data online when needed (eg in response to a complaint) and would very rarely need to download and hold information.

11. Secondly, that the information is held by a third party contractor on behalf of, and for the primary purposes of the site operator, Cuadrilla. Cuadrilla require the data such that it can monitor noise emissions in accordance with the limits of set out in its planning permission. Neither are public authorities as defined by the EIR.
12. The Commissioner's role in this particular case is not to decide whether the Council has access to the requested information but rather to decide whether it would in principle under the EIR hold any or all of the requested noise monitoring data.
13. The Commissioner's guidance '*Information held by a public authority for the purposes of the EIR (regulation 3(2))*¹' sets out that:

There are several factors that are likely to indicate that information is also held by the public authority, including:

- *Provision by the authority of clerical and administrative support for another person, whether a legal requirement or not.*
 - *The authority controls access to the information.*
 - *The authority takes its own decisions about what information is retained, altered or deleted.*
 - *The authority handles enquiries about the information.*
 - *The authority includes costs arising from holding the information in its overall budget.*
14. The Council has confirmed that it does not provide administrative support, control access, make decisions or handle enquiries about the data. Furthermore it stated "*The Council does not hold or manage the data. No costs are incurred, and so no budget is needed, nor have [the Council] provision in its budget in regard to the requested information.*"

¹ https://ico.org.uk/media/for-organisations/documents/1640/information_held_for_the_purposes_of_eir.pdf

15. The guidance on regulation 3(2) also sets out the Commissioner's general approach to assessing whether information is held by a third party on behalf of the public authority. The guidance states that

there are several circumstances in which this may apply, two of these would appear to have some relevance to the present case:

- **Contractual arrangements** – *where information is held by a third party as a result of contractual arrangement, the provisions of the contract may indicate whether or not the information is held on behalf of the public authority.*
- **Information held on behalf of a public authority as a result of partnership or consortia arrangements** – *when public authorities work in partnership or in a consortium (ie those arrangements which do not have the legal status of a body or organisation separate to the individual partners), they need to be certain what information is held on behalf of each partner or member. This will arise in the public sector when the partners, who are otherwise independent bodies, agree to co-operate to achieve a common goal, create an organisational structure and agreed programme and share information, risks and rewards.*

16. The Council advises that *"Lancashire County Council does not have a contract with Cuadrilla. Rather Cuadrilla has a contract with a private consultancy. The County Council simply views the data which is held on a third party web site on an occasional basis."*

17. The Council has explained that it can view the data online in response to a complaint. Moreover that the primary requirement for collecting of the data belongs to Cuadrilla in order to: *"check compliance with the noise limits in their planning permission. The real time monitoring and web access (coupled with text message alerts Cuadrilla receives when noise levels approach the limit) allows Cuadrilla to actively manage the noise and their compliance with limits. It is Cuadrilla's responsibility to ensure they comply with the noise limits in their planning permission. It is ultimately their data, and their management tool managed by a third party."*

18. The Commissioner has found no evidence of a contractual arrangement in regard of the requested information between the Council and Cuadrilla. Additionally the Commissioner is satisfied that the principle requirement for holding the data is with Cuadrilla, a privately owned company, to enable the management of noise levels within planning limits. She can see no requirement for, or evidence of, a partnership arrangement with the Council.

19. The Commissioner is therefore satisfied that the requested information is not held on behalf of the Council.
20. Additionally the Commissioner has considered whether the Council holds any further information than it has disclosed. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner will assess the reasons offered to explain why the information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities
21. The Council advised that it is easier for them to deal with the data online rather than download it. The Council is aware of one occasion when this had happened and has provided the information. Furthermore it confirmed that *"No data has been destroyed or deleted by us. There is no statutory requirement for us to hold the information. There is no information that we hold that is similar."*
22. In the absence of any evidence to the contrary the Commissioner concludes that on the balance of probabilities, further information is not held by the Council.
23. The Commissioner appreciates that the complainant has concerns about the monitoring of noise levels, however the EIR provides members of the public the right to access environmental information that is held by public authorities. The key aspect being information that is held, within the terms of the legislation as stated in regulation 3(2), not information which is simply accessible to the Council.
24. The Commissioner's decision is that regulation 3(2) is not engaged and on the balance of probabilities, the Council does not hold the requested information. It is therefore entitled to rely on regulation 12(4)(a) of the EIR in this case.

Right of appeal

25. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

26. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
27. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
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